TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 23.

THOMAS C. REDFORD AND EMMA REDFORD, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 10, 1924.

(28,456.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 277.

THOMAS C. BEDFORD AND EMMA BEDFORD, APPELLANTS,

vs.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 3, 1902.

1 In the Court of Claims.

THOMAS C. BEDFORD
v.
UNITED STATES. } No. 20514.

EMMA BEDFORD, THOMAS C. BEDFORD
v.
UNITED STATES. } No. 20515.

I.—*Petitions.*

(A.)—Petition in 20514. Filed Sept. 17, 1896.

THOMAS C. BEDFORD
vs.
THE UNITED STATES. } No. 20514.

The petition of Thomas C. Bedford, a citizen of the United States, residing in the State of Louisiana, respectfully represents that he became the owner in fee-simple, by inheritance on January 21, 1891, of the following-described lands in the State of Louisiana, to wit: Sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, twenty, twenty-one, and twenty-two, all in township fifteen, north; range fifteen, east.

2 Said petitioner further alleges that he is the sole and only heir-at-law of George M. Bedford, his brother, and that he was the sole and only heir when his brother departed this life, on January 21, 1891; and the said decedent owned said lands in fee-simple continuously from a date prior to the year 1879. Said decedent died intestate and no letters of administration were ever taken out on his estate and the debts of his estate, which were not consequential, were fully paid by your petitioner; that the said lands lay alongside of and abutting the Mississippi river, in said State of Louisiana; that to wit, in the years 1879 and '80, the said defendant, The United States, in the execution of its rights and powers, in and over said river, and in pursuance of its lawful control over the navigation of said river and for the betterment and improvement thereof, by its duly authorized officers and agents, made and caused to be made a certain revetment of willow, stone and other materials, at a point immediately up said river, a distance of about six miles from the north line of said described lands.

That said revetment was constructed along said river for a distance of one-half mile; that said revetment was so constructed at said point in and on said river as to effectually and completely divert the waters of said river from a southward course towards the east; and said revetment was constructed also for the purpose of keeping the bed of said river from moving westward at the point where said revetment was constructed and for the further purpose of protecting the harbor at the city of Vicksburg, in the State of Mississippi.

That said revetment was constructed in the years 1879 and 1880 as aforesaid and was rebuilt and improved by said defendant in the years 1892 and 1893. That the construction and maintainance of said revetment caused the waters of said river to be diverted from a south and southeasterly course to an easterly course, and to be thrown with great force against the east bank of said river, which bank extends from the north to the south, is high and strong and is composed of limestone and other hard substances, which do not give way to erosion. That said waters were diverted as aforesaid by said revetment against said east bank with great force, and *was* by said bank thrown back against the west bank of said river, also with great force at and against and along the bank of said west side, where said described sections of land were located.

That at the time of the construction of said revetment said lands were open and cultivated and the most of the same were highly improved and had negro cabins, residences, a steam gin and other permanent and lasting improvements on the same of the value of $15,000; and said improvements were injured, partly destroyed and appropriated by the diversion of said waters and were of the value of $15,000 when so injured, partly destroyed and appropriated, and many of said improvements had to be moved and set back at an expense of not less than $5,000.

Your petitioner's title to such part of said lands as were not destroyed and appropriated as aforesaid before May 1, 1895, was divested and passed from him on said date by a sale under a deed of trust.

3 Your petitioner alleges that said lands suffered little or no damage prior to the years 1885 and 1886; that nearly all of said invasion of waters, caving in of land and appropriation as aforesaid has taken place since said dates; that 1793 acres of said described lands were invaded, overrun and appropriated as aforesaid prior to May 1st, 1895, and that all of said acres above described are now in the bed of said river and are part of said navigable waterway and were appropriated to said waterway and the United States by the diverted waters of said river before said date, and had at the time of such destruction an even value of thirty dollars per acre.

And that the amount of depreciation, loss, damage and injury sustained by this claimant, your petitioner, by reason of the appropriation of said property as aforesaid, amounts as said claimants verily believes, to the sum of $58,000.00, for which no compensation whatever has been paid.

Second.

Your petitioner further represents that he is a citizet of the United States, residing in the State of Louisiana, and that he was the owner in fee-simpld by inheritance since January 21, 1891, of the following-described lands in the State of Louisiana, to wit: Sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, twenty, twenty-one and twenty-two, all in township fifteen, north; range fifteen, east.

Said petitioner alleges that he is the sole and only heir-at-law of

George M. Bedford, his brother, and that he was the sole heir when the said brother departed this life on said date; and the said decedent owned said lands in fee-simple continuously from a date prior to the year 1879. That said decedent died intestate and no letters of administration were ever taken out on his estate, and that the debts of his estate, which were not consequential were fully paid and satisfied by said heir; that the said lands lay alongside of and abutting the Mississippi river, in said State of Louisiana; that to wit, in the years 1879 and 1880 the said defendant, The United States, in the execution of its rights and powers in and over said river, and in pursuance of its control over the navigation of said river and for the betterment and improvement thereof, by its duly authorized officers and agents, made and caused to be made a certain revetment of willow, stone and other materials at a point immediately up said river, a distance of about six miles from the north line of said described lands. That said revetment was constructed along said river for a distance of one-half mile; and was so constructed at said point in and on said river as to effectually and completely divert the waters of said river from a southward course to an easterly course; and said revetment was constructed also for the purpose of keeping the bed of said river from moving westward at the point where the same was constructed and for the further purpose of protecting the harbor at the city of Vicksburg, in the State of Mississippi.

That said revetment was constructed in the years of 1879 and 1880 as aforesaid, and was rebuilt and improved by said de-
4 fendant, in the years 1892 and '93. That the construction and maint*a*inance and preservation of said revetment by said defendant caused the waters of said river to be diverted from a south and southeasterly course, to an easterly course, and to be thrown with great force against the east bank of said river, which bank extends from the north to the south, and is high and strong and is composed of limestone and other hard substances, which do not give way to erosion. That said waters were diverted as aforesaid by said revetment against said east bank with great force and *was* by said east bank thrown back against the west bank of said river also with great force, at and against and along the bank of said west side, where said described sections were located.

That at the time of the construction of said revetment and for a time afterwards said lands were open and cultivated and most of the same were highly improved and had negro cabins, residences and fences, a steam gin, and other permanent and valuable improvements on the same, of the value of $5,000, and that said improvements were located on that part of said described lands which were destroyed prior to January 21, 1891, and that said improvements were injured, partly destroyed and appropriated by said diverted waters, along with the acres of land hereinafter described; and said improvements were of the value of $5,000, when they were so destroyed and appropriated, and many of said improvements had to be moved and set back at great expense to wit: $1,000.

And your petitioner alleges that said described lands suffered

little or no damage prior to the years 1885 and 1886 and that nearly all of said invasion of said waters, caving in and appropriation of lands has taken place since said date.

That 404 acres of said described lands were invaded, overrun and appropriated, as aforesaid, together with said improvements prior to January 21, 1891 and that all of the said acres, last above described are within the banks of said river and part of said navigable waterway and were appropriated to said waterway and the United States by the diverted waters of said river before said date and that said acres so appropriated had at the time of such destruction and appropriation, an even value of thirty dollars per acre.

And the amount of depreciation, loss, damage and injury sustained by this claimant, your petitioner, by reason of the appropriation of said property as aforesaid, amounts as claimant verily believes to the sum of $13,000, for which no compensation whatever has been paid.

Third.

Your petitioner further represents that he is a citizen of the United States, residing in the State of Louisiana, and he was the owner in fee-simple, by inheritance from January 21, 1891, of the following-described lands in the State of Louisiana, to wit: Sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, twenty, twenty-one and twenty-two all in township fifteen, north; range fifteen, east.

5 Said petitioner alleges that he is the sole and only heir-at-law of George M. Bedford, his brother, and that he was the sole heir when his said brother departed this life, on said date; and the said decedent owned said lands in fee-simple continuously from a date prior to the year 1879. Said decedent died intestate and no letters of administration were ever taken out on his estate and the debts of his estate, which were not consequential, were fully paid by said heir; that said lands lay alongside of and abutting the Mississippi river, in the State of Louisiana; that to wit, in the years of 1879 and '80 the said defendant, The United States, in the execution and exercise of its rights and powers in and over said river, and in pursuance of its lawful control over the navigation of said river and for the betterment and improvement thereof, by its duly authorized officers and agents, made and caused to be made, a certain revetment of willow, stone and other materials at a point immediately up said river, a distance of about six miles from said described lands. That said revetment was constructed along said river for a distance of one-half mile; that said revetment was so constructed, at said point in and on said river as to effectually and completely divert the waters of said river from a southward course to an easterly course; and said revetment was constructed also for the purpose of keeping the bed of said river from moving westward at the point where said revetment was constructed and for the further purpose of preserving the harbor for the city of Vicksburg, in the State of Mississippi; that said revetment was constructed in the years 1879 and 1880 and was rebuilt and improved by said defendant in the years 1892 and 1893.

That the construction, repair and maintainance of said revetment caused the waters of said river to be diverted from a south and southeasterly course, to an easterly course, and to be thrown with great force against the east bank of said river, which bank extends from the north to the south, is high and strong and is composed of limestone and other hard substances which do not give way to erosion. That said waters were diverted as aforesaid by said revetment against said east bank with great force and *was* by said bank thrown back against the west bank of said river at and along the bank of said west side where said described sections were located.

That at the time of the construction of said revetment said lands were open and cultivated and that most of the same were highly improved and had negro cabins, fences, residences, a steam gin, and other permanent and lasting improvements on the same to the value of $10,000. And that said improvements were located upon that part of said lands which were destroyed and appropriated by the waters of said river during that period of time between January 21, 1891 and May 1st 1895, and said improvements were injured, partly destroyed and appropriated by said diverted waters and were of the value at the time of such destruction and appropriation, of $10,000, and many of said improvements had to be removed and set back at great expense, to wit: $4,000.

6 Your petitioner's title to such a part of said lands as were not destroyed by said diversion and appropriation, before May 1st, 1895, *were* divested and passed from him, by a sale under a deed of trust. And your petitioner alleges that said land suffered little or no damage prior to the years 1885 and 1886; that nearly all of said invasion of diverted waters and caving in and appropriation of lands have taken place since said years 1885 and 1886.

That 1389 acres of said described lands were invaded, overrun and appropriated, as aforesaid during the period between January 21, 1891, the date of said decedent's death and May the 1st, 1895, when the title of your petitioner to such a part of said lands as were not then destroyed *were* divested as aforesaid, and all of said acres which were appropriated during said period are covered with the waters of said river and have been enclosed within the banks of said river and are part of its bed and were appropriated to the waters of said waterway and the United States by the diverted waters of said river during said period and that said acres had at the time of such destruction and appropriation an even value of thirty dollars per acre.

And that the amount of depreciation, loss, damage and injury sustained by this claimant, your petitioner, by reason of the appropriation of said real estate and the destruction of said permanent and lasting improvements, amounts as said claimant verily believes to the sum of $46,000, for which no compensation whatever has been paid.

Your petitioner further represents that he is the sole owner of said claim for all the above-described injury, damage, loss, and that he has not sold, transferred or assigned the same or any part thereof.

Wherefore your petitioner prays judgment for $58,000, his costs, and all other necessary and proper relief.

T. C. BEDFORD.

C. L. TREVITT,
Attorney for Petitioner.
E. V. BROOKSHIRE, *Of Counsel.*

STATE OF MISSISSIPPI, }
County of Warren, } *ss:*

T. C. Bedford, being duly sworn, deposes and says that he is the petitioner above named, that he has read the foregoing petition by him subscribed and knows the contents thereof and that the facts therein stated of his own knowledge are true and those stated on information and belief he believes to be true.

T. C. BEDFORD.

Subscribed in my presence and sworn to before me this 24th day of July, 1896.

JOHN BRUNINI,
Notary Public.

7 (B.)—*Petition in No.* 20515. *Filed Sept.* 17, 1896.

EMMA BEDFORD, THOMAS C. BEDFORD
vs.
THE UNITED STATES. } No. 20515.

The petition of Emma Bedford, the wife of Thomas C. Bedford, a citizen of the United States, residing in the State of Louisiana, respectfully represents that she became the owner in fee-simple of such a part of the following-described lands, on May the 1st, 1895, as had not been overrun and destroyed by the waters of the Mississippi river, which lands are situated in the State of Louisiana, and are described as follows, to wit:—Sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, twenty, twenty-one and twenty-two, all in township fifteen, north; range fifteen east; that said lands lay alongside of and abutting the Mississippi river; that to wit: in the years 1879 and '80 the said defendant, The United States, in the execution of its rights and powers in and over said river, and in pursuance of its lawful control over the navigation of said river and for the betterment and improvement thereof, by its duly authorized officers and agents, made and caused to be made a certain revetment of willow, stone and other material, at a point immediately up said river a distance of about six miles from the north line of said described land.

That said revetment was constructed along said river for a distance of one-half mile; that said revetment was so constructed, at said point in and on said river, as to effectually and completely divert the waters of said river from a southward course toward the east; and said revetment was constructed also for the purpose of keeping the bed of said river from moving westward at the point of

said construction and for the further purpose of preserving the harbor for the city of Vicksburg, in the State of Mississippi.

That said revetment was constructed in the years 1879 and '80 as aforesaid, and was rebuilt and improved by said defendant in the years 1892 and 1893. That the construction and maintainance of said revetment caused the waters of said river to be diverted from a south and southeasterly course to an easterly course, and to be thrown with great force against the east bank of said river, which bank extends from the north to the south; is high and strong and is composed of limestone and other hard substances, which do not give way to erosion. That said waters are diverted as aforesaid by said revetment against said east bank with great force and *was* by said bank thrown back against the west bank of said river also with great force, at and along the bank of said west side, where said described sections of land are located.

That when your petitioner became the owner of said lands they were open and cultivated and in a high state of improvement and had negro cabins, fences, houses and other valuable improvements on the same and that such improvements were permanent and lasting and were of the value of five thousand dollars. And said improvements were injured, destroyed and appropriated by said diverted waters and were of the value of five thousand dollars when so destroyed and appropriated and were located upon that part of said described lands which were destroyed and appropriated since May the 1st, 1895.

That 352 acres of said described lands were invaded, overrun and appropriated as aforesaid since said date.

And that all of said acres so appropriated are now covered with the waters of said river and are part of said navigable waterway, and were appropriated by said waterway and the United States by said diverted waters; and that said acres had at the time of such destruction and appropriation an even value of thirty dollars per acre.

And that the amount of depreciation, loss, damage and injury sustained by this claimant, Emma Bedford, by reason of the appropriation of said property as aforesaid, amounts as said claimant verily believes to the sum of $16,000, for which no compensation whatever has been paid.

Your said petitioner, Emma Bedford, further represents that she is the sole owner of said claim and has not sold, transferred or assigned the same or any part thereof.

Wherefore your petitioner prays judgment for $16,000, her costs, and all other necessary and proper relief.

EMMA BEDFORD.

C. L. TREVITT,
Attorney for Petitioner.
E. V. BROOKSHIRE, *Of Counsel.*

STATE OF LOUISIANA, *Parish of Madison,* } ss:

Emma Bedford being first duly sworn deposes and says that she is the petitioner above named, that she has read the foregoing petition by her subscribed and knows the contents thereof, and that the facts therein stated of her own knowledge are true and those stated on information and belief she believes to be true.

EMMA BEDFORD.

Subscribed in my presence, and sworn to before me this 25th day of July, A. D. 1896.

P. J. WATSON,
Justice of the Peace.

9 (C.)—*Amended Petition. Filed February* 28, 1898.

THOMAS C. BEDFORD
vs.
THE UNITED STATES. } No. 20514.

Your petitioner, Thomas C. Bedford, by leave of court first had and obtained, files this his amended petition, and respectfully represents as follows:

1. That he is a citizen of the United States, residing in the State of Louisiana, and brings this petition in his own right against the respondent, The United States of America.

2. That heretofore, to wit: on the 21st day of January, 1891, George M. Bedford, a citizen of the United States and a resident of said State, died intestate, seized in fee of the following-described real estate, situated, lying and being in the State of Louisiana, and being known as sections eleven (11) twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), twenty (20), twenty-one (21), and twenty-two (22) in township fifteen (15), north, range fifteen (15) east, leaving your petitioner as his only heir-at-law and next of kin, and as such your petitioner became the owner of said land in fee-simple.

3. That said lands lay along and abutting the Mississippi river about six miles from a certain revetment at Delta peninsula, Louisiana. That during the years from 1878 to 1894, inclusive, the said respondent The United States, in the execution of its rights and powers, and in pursuance of its lawful control over the navigation of said river, and for the betterment and improvement thereof, did, by its duly authorized officers and agents, make or cause to be made and constructed said revetment, which was composed of willow, stone and other suitable materials, at a point immediately up said river at a distance of about six miles from the line of the land aforesaid.

4. That said revetment was constructed along said river at and around the upper bank and point of said Delta peninsula, for the purpose of keeping the bed of said river from moving westward and

destroying the land on which the town of Delta is located, and also for the purpose of protecting the harbor at the city of Vicksburg, in the State of Mississippi.

5. That the construction and maintenance of said revetment during the period from February 1st, 1891, to May 1st, 1895, caused the water of said river to be diverted from its original channel, a southerly course, and to be thence thrown with great force against the east bank of said river, which east bank is composed of limestone and other hard substances which will not give way to erosion.

6. That by reason of said waters being diverted from their original course and ancient channel by said revetment, and being thrown against the east bank of said river with such force, they were caused to rebound and to be thrown back against the west bank of same, where the lands of your petitioner are located; completely overflowing and destroying seventeen hundred and ninety-three (1,793) acres of same, together with the improvements thereon.

7. That the officers and agents of The United States, the respondent, well knew at the time of the construction of said revetment, that the same would divert the waters of said river from its original and ancient channel, and throw them against and over your petitioner's land.

8. That at the time your petitioner became the owner of said lands, in the year 1891, they were open and in a good state of cultivation, and were improved with cabin residences, a steam cotton gin and other permanent and valuable improvements, the lowest value of which being $15,000, and which were injured, partly or totally destroyed or appropriated by the diversion of the waters of said river.

9. Your petitioner therefore alleges that said seventeen hundred and ninety-three acres of land were invaded, overrun, appropriated and destroyed during said period of time by reason of the diversion of the waters of said river, and that all of same are now in the bed of said river, forming a part of its navigable waterway. Your petitioner further alleges that all of said land was worth, at the time of the destruction of same, at least thirty dollars ($30) per acre, and that the amount of depreciation, loss, damage and injury sustained by your petitioner, by reason of the appropriation of the property, and the damage to the improvements aforesaid amounts to fully $58,000, for which he has received no compensation whatever.

Your petitioner further represents that he is the sole owner of said claim for the above-described injury and damage, and that he has not sold, transferred, or assigned the same or any part thereof.

Wherefore your petitioner prays judgment for the sum of fifty-eight thousand ($58,000) dollars, his costs, and all other necessary relief.

T. C. BEDFORD.

C. L. TREVITT,
Attorney for Petitioner.
E. V. BROOKSHIRE, *Of Counsel.*

STATE OF LOUISIANA, *Parish of Madison,* } ss:

Thomas C. Bedford, being first duly sworn, deposes and says that he is the petitioner above named, that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts therein stated of his own knowledge are true, and these stated upon information and belief he believes to be true.

T. C. BEDFORD.

Subscribed in my presence and sworn to before me this 13th day of June, 1897.

JOHN BRUNINI,
Notary Public.

[SEAL.]

11 II.—*Traverse. Filed January* 22, 1901.

THOMAS C. BEDFORD
vs.
THE UNITED STATES. } No. 20514.

EMMA BEDFORD
vs.
THE UNITED STATES. } No. 20515.

And now comes the Attorney General, on behalf of the United States, and answering the petitions of the claimants herein, denies each and every allegation therein contained; and asks judgment that the said petitions be dismissed.

L. A. PRADT,
Assistant Attorney General.

12 III.—*Findings of Fact and Conclusion of Law as Amended February* 3, 1902, *and Filed as of October* 28, 1901.

The above-entitled causes having been heard by the Court of Claims, the court, upon the evidence, makes the following findings of fact:

I.

The claimants herein, Thomas C. Bedford and Emma Bedford his wife, are citizens of the United States, residing at Vicksburg, in the State of Mississippi.

II.

In March, 1877, and November, 1889, George M. Bedford acquired by purchase sections 11, 12, 13, 14, 15, 16, 17, 20, 21, and 22 in township 15 north, range 15 east, containing 5,000 or 6,000 acres of land, together with cabins, other buildings, and fences thereon, lying and being in Madison parish, in the State of Louisiana, which lands he continued to hold and possess until January, 1891, when he died intestate, leaving as his only heir-at-law his brother, Thomas C. Bedford, one of the claimants herein. Said Thomas C. Bedford claims

to have been the owner of said described real estate in fee-simple, and for the purpose of this suit is so found to have been, until the said lands were sold at judicial sale in May, 1895, to the claimant, Emma C. Bedford, his wife, to satisfy a mortgage theretofore executed by him on said described lands. His said wife Emma, claimant herein, now claims to be the owner of said described lands in fee-simple, and for the purpose of this suit is so found to be.

At the time of the death of said George M. Bedford about 850 acres of said lands were cleared, and at the time the claimant, Emma Bedford, became the owner thereof by purchase, as aforesaid, about 1,300 acres of said lands were cleared.

III.

Prior to the spring of 1876 the Mississippi river flowed around a narrow neck of land known as De Soto point, and in going around this point flowed by the city of Vicksburg in a southwesterly direction. In the spring of 1876 De Soto point became so narrow by erosion that the river broke through, leaving De Soto point as an island, thereby shortening the distance of the stream about 6 miles and taking its course immediately to the south with great velocity against the Mississippi bank at what is known as the cut-off of 1876. The result was that the city of Vicksburg was left some miles away from the main channel of the river, and the old channel in front of the city was continually filled up, making the approach from the river to the docks along the river difficult if not impossible.

IV.

Between 1878 and 1884 the United States constructed about 10,700 feet of revetment along the banks of the Mississippi river at Delta point, Louisiana, for the purpose of preventing the further erosion of that point. The revetment consisted of willow mattresses weighted down by stones, and were placed on sand banks below high-water mark. The revetment was neither upon nor in contact with the claimants' lands. The object of the construction was to prevent the navigable channel of the river from receding farther from the city of Vicksburg, which had been left some distance from the main channel of the river by the cut-off of 1876, as aforesaid. The revetment was repaired slightly in 1886 and 1889, and more extensively in 1894, all of which work was paid for from time to time out of the appropriations made therefor by Congress, as found in 20 Stat. L., 363, 366; 21 Stat. L., 181, 470; 26 Stat. L., 450, 1116.

V.

In making the improvement aforesaid the defendants did not recognize any right of property in the claimants in and to the right alleged to be affected, and did not assume to take private property in and by the construction of the revetment, but proceeded in the exercise of a claimed right to improve the navigation of the river.

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VI.

After the cut-off at De Soto point in 1876 and the construction of the revetment, as aforesaid, the channel and current of the Mississippi river were gradually directed toward the lands of the claimants, situated about 6 miles below said cut-off *and did*, about the year 1882, reach said lands and thereafter erode and overflow about 2,300 acres of their lands, which overflow has ever since continued. About 400 acres of their lands so eroded and overflowed was prior to the death of said George M. Bedford, through whom the claimants claim title, and about 900 acres of which were overflowed thereafter and prior to said judicial sale, and the residue after said sale. Of the lands so overflowed about 1300 acres thereof were cleared and in cultivation, of which about 700 acres were so cleared prior to May 2, 1895.

The damage to the claimants, and each of them, by reason of the washing away of their lands during their respective ownership, as aforesaid, is an excess of $3,000.

VII.

The cause of the deflection of the river upon the claimants' land was the cut-off which shortened the distance of the stream 6 miles and thereby increased the velocity of the current, and forced the current to turn, when it struck the Mississippi bank, at an abrupt angle. The revetment did not change the course of the river as it then existed, but operated to keep the course of the river at that point as it then was. If the revetment had not been built the cut-off would have continued to widen toward the Louisiana bank, and the channel would have continued to move in the same direction. With the widening of the cut-off and the shifting of the channel the angle at the turn below the cut-off would have gradually become less abrupt, and the deflection of the stream upon the claimants' land would have grown less, and the consequent injury to the claimants' land would have been decreased. To what extent the injury would have been decreased is conjectural. The injury done to the claimants' land was an effect of natural causes; the injury caused by the Government was by interrupting the further progress of natural causes, *i. e.*, the further change in the course of the river, and is also conjectural.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are not entitled to recover, and their respective petitions are therefore dismissed.

By the COURT.

14

IV.—*Opinion of the Court.*

Peelle, J., delivered the opinion of the court.

The claimants in this action seek to recover $74,000 on account of damages alleged to have been sustained by the overflow and the

washing away of the buildings and fencing thereon of about 2,300 acres of land owned by them successively on the west bank of the Mississippi river in Madison county, La., located about 6 miles below the city of Vicksburg, $58,000 of which is claimed by Thomas C. and $16,000 by his wife, Emma.

Prior to 1876 the Mississippi river flowed around a narrow point of land known as De Soto point, and in going around this point flowed by the city of Vicksburg in a southwesterly direction. In the spring of 1876 De Soto point became so narrowed by erosion that the river broke through, leaving De Soto point as an island, and taking its course immediately to the south. The result was that the city of Vicksburg was left some miles away from the main channel of the river, and the old channel continually filled up, thereby making the approach from the river to the docks in front of the city very difficult.

In consequence of that cut-off the United States, by their officers and agents, between 1878 and 1884, constructed about 10,700 feet of revetment along the banks of the river at Delta point, on the Louisiana side, for the purpose of preventing further erosion. The revetment consisted of willow mattresses weighted down by stones which were placed on the banks of the river below high-water mark, though not on or in contact with the lands of the claimants. The object of the construction was to prevent the navigable channel of the river from receding farther from the city of Vicksburg. The revetment was repaired in 1886 and in 1889, and still more extensively in 1894, all of which work was paid for out of the appropriations made by Congress from time to time. (20 Stat. L., 363, 366; 21 Stat. L., 181, 470; 26 Stat. L., 450, 1116.)

The effect of the revetment, as intended, was to preserve the banks of the river at Delta point in the same position and condition they were in at the time the revetment was built.

In making the improvement the defendants did not recognize any right of property in the claimants in or to the right alleged to be affected; nor did they assume to take private property in the construction, but proceeded in the exercise of their right to improve the navigation of the river.

After the cut-off at De Soto point in 1876, and the construction of the revetment thereafter, the current of the river was directed against and upon the lands of the claimants, situate about 6 miles below, and thereby overflowed and washed away the buildings and fences thereon to the damage of each of said claimants in a sum in excess of $3,000.

The claimants' contention is that, by the construction of the revetment, the channel of the river was diverted from its natural course and thereby made to overflow their lands depriving them of their use; which overflow, they contend, was the taking of private property for public use, for which just compensation should be made within the meaning of the fifth amendment to the Constitution, as in effect construed by the Supreme Court in the case of *Pumpelly v. Green Bay Company*. (13 Wall., 166.)

In that case Pumpelly brought trespass on the case against the

Green Bay Company for overflowing 640 acres of his land by means of a dam erected across Fox river, the northern outlet of Lake Winnebago, by reason of which the waters of the lake were raised so high as to forcibly and with violence overflow said land, tearing up his trees and grass by the roots and washing them, with his hay, away, choking up his drains and filling up his ditches, and otherwise injuring his lands by leaving deposits of sand, etc.

On that state of facts the court, in construing the provision of the constitution of Wisconsin, which provides that "the property of no person shall be taken for public use without just compensation therefor," said: "But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. And perhaps no State court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision than that of Wisconsin. In numerous cases of this kind, under the mill and milldam act of that State, this question has arisen, and the right of the mill-owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the court has often expressed its doubt whether the use under that act was a public one, within the meaning of the constitution, but it has never been doubted in any of those cases that it was such a *taking* as required compensation under the constitution. As it is the constitution of the State that we are called on to construe, these decisions of her supreme court,
15 that overflowing land by means of a dam across a stream is taking private property within the meaning of that instrument, are of special weight if not conclusive on us. And in several of these case the dams were across navigable streams." * * *

"We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual, arising from the prosecution of improvements of roads, streets, rivers and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application to many injuries to property so originating. And when in the exercise of our duties here we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country and certainly not

with sound principle. Beyond this we do not go, and this case calls us to go no further."

In that case the overflow was caused by the dam constructed at the outlet of the lake, which raised the water above the ordinary level.

The dam was constructed pursuant to an act of the legislature of Wisconsin. The lands were not absolutely taken or converted to the uses of the public, but the owner, by reason of the overflow, was deprived of their possession and use, and that deprivation of private property was held to be a taking for public use for which compensation should be made within the meaning and intent of the constitution of Wisconsin. To the same effect, also, is the case of *Eaton v. Boston, Concord and Montreal Railroad Company* (51 N. H., 504).

Later, in the case of *Transportation Company v. Chicago* (99 U. S., 635, 642) the court referring to the authorities collected at page 542, Cooley's Constitutional Limitations, says that in those two cases—that is, the Pumpelly case and the Eaton case (*supra*)—is to be found, perhaps, "the extremest qualification of the doctrine."

The Government is only liable for the acts of its agents within the reasonable scope of their authority, and if they exceed that their acts are wrongful, for which the Government is not liable. *Langford v. United States* (101 U. S., 341); *Hill v. United States* (149 U. S., 592).

In the present case, however, the officers and agents of the Government were authorized by sundry acts of Congress to improve the Mississippi river in the interest of navigation, and the construction of the revetment for the protection of the harbor of Vicksburg appears to have been within the limits of their authority. (20 Stat. L., 363, 366; 21 Stat. L., 181, 470; 26 Stat. L., 450, 1116.)

The power to control and improve the navigable rivers in the United States is derived from article 1, section 8, of the Constitution, which grants to Congress the power "to regulate commerce with foreign nations and among the several States," and is complete in itself, and may be exercised to its utmost extent consistent with the limitations prescribed in the Constitution. *Gibbons v. Ogden* (9 Wheat., 1, 196). The power to regulate commerce with foreign nations and among the several States includes the power to control for that purpose "all the navigable waters of the United States which are accessible from a State other than those in which they lie." *Gilman v. Philadelphia* (3 Wall., 713, 724); *Genese Chief v. Fitzhugh* (12 Howard, 443); *Illinois Central Railroad Company v. Illinois* (146 U. S., 387).

That the Government had the undoubted power and authority to improve the river by the construction of the revetment, as it did, is conceded by the claimants; but their contention is that, by reason of the construction, the channel of the river was diverted from its natural course, thereby overflowing their lands and depriving them of their use as the proximate result thereof.

Therefore, in the construction of the revetment for the improvement of navigation in the interest of commerce the Government was in the rightful control of the river and to that extent and for that

purpose was the owner. Or, as was said in the case of *Gilman v. Philadelphia* (*supra*), "for this purpose they are the public property of the nation and subject to all the requisite legislation by Congress." The appropriations made from time to time for the improvement of the river was an assertion of a right belonging to the Government.

Where the Government takes property for public use, asserting no title thereto, but, on the other hand, conceding the same to be private property, an implied contract will arise to make just compensation therefor, as was held in the case of the *Great Falls Manufacturing Company v. United States* (112 U. S., 645). But that case is not controlling in the present case.

16 As to the questions of fact going to the cause of the deflection of the river and the effect of the revetment on the stream, we have found in finding VII that the cause of the deflection of the river upon the claimants' land was the cut-off which shortened the distance of the stream 6 miles, and thereby increased the velocity of the current and forced the current to turn when it struck the Mississippi bank at an abrupt angle. The revetment did not change the course of the river as it then existed, but operated to keep the course of the river at that point as it then was. If the revetment had not been built, the cut-off would have continued to widen toward the Louisiana bank, and the channel would have continued to move in the same direction. With the widening of the cut-off and the shifting of the channel, the angle at the turn below the cut-off would have gradually become less abrupt, and the deflection of the stream upon the claimants' land would have grown less, and the consequent injury to the claimants' land would have been decreased. To what extent the injury would have been decreased is conjectural. The injury done to the claimants' land was an effect of natural causes; the injury caused by the Government was by interrupting the further progress of natural causes, *i. e.*, the further change in the course of the river, and the extent of such injury is conjectural.

In the case of *Gibson v. United States* (166 U. S., 269, 271), affirming the judgment of this court (29 C Cls. R., 18), where numerous authorities are collated and commented upon, the claimant, as owner of land bordering on the Ohio river, had riparian rights, of which she was deprived by reason of the construction, by authority of an act of Congress, of a dike which diverted the water from the claimant's frontage, thereby causing her great damage, yet the court held that "although the title to the shore or submerged soil is in the various States and individual owners under them, it is always subject to servitude in respect to navigation created in favor of the Federal Government by the Constitution." It was also held, in substance, that riparian ownership was subject to the dominant right of the Government to improve navigation, and that the damage resulting from the construction of the dike for the public good was not the result of a taking of the claimant's property, but that the same was "merely incidental to the exercise of a servitude to which her property had always been subject."

That case, however, differs from the case of *Pumpelly v. Green Bay Company* (*supra*) in this, that in the latter case there was a physical invasion of the claimant's property by flooding, while in the former there was no invasion.

In the case of *South Carolina v. Georgia* (93 U. S., 4, 11) it was said: "It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over interstate and foreign commerce is concerned, this is not to be doubted."

Thus reviewing the authorities and the facts of this case, was the overflow of the claimants' lands and the washing away of the improvements thereon the result of the exercise by the Government of its right of eminent domain, and if so, upon what theory?

The claimants were deprived of their lands by natural causes, and if any injury was added thereto by the acts of the Government it was consequential and the extent thereof is conjectural; nor was anything said between the parties looking to an appropriation of the land.

The Government not only has the unquestioned power to improve the navigable rivers of the United States, but in respect to those rivers "accessible from a State other than those in which they lie" the improvement rests with the Government; and when injury results to lands from natural causes, affecting commerce, shall the Government delay improvement until from natural causes such injury has been righted?

In the *McIntire case* (25 C. Cls. R., 200) the United States quarried stone near a coal mine in such manner that the mine was flooded, and the claimant contended that it was a taking of his property under the right of eminent domain within the meaning of the *Pumpelly* and *Great Falls cases* (*supra*); but the court said: "In the Great Falls case, upon which plaintiff particularly relies, there was an actual appropriation of the property for the purpose of constructing an aqueduct; it was taken avowedly as private property,
17 to which the Government asserted no title, and was used for the public benefit. The making of the improvements necessarily involved the taking of this property, and when taken it was applied to a public use. In the case at bar appear none of these elements. There was no action by the Government officers looking to a taking of this property; there was no communication of any kind between plaintiff and defendants except a statement made by a subordinate that the Government would make good any injury sustained by plaintiff. It certainly never was intended to appropriate the mine even for temporary purposes, and the flooding of itself was of no benefit to the Government." See also the *Johnson's case* (31 C. Cls. R., 262).

We think it may now be regarded as settled that no implied contract can arise where the Government takes property claiming title and right thereto, and in the Gibson case in this court (29 C. Cls. R., 25), in speaking of that phase of the question, the court said: "The fact that the Government denies the title to the party and bases its action upon a right of its own repels the presumption upon which an implied contract is founded. There can be no contract unless the parties, either by expression or implication, agree; and where the United States deny the title of plaintiff in a taking, the law will not imply, as against the claim of the Government, an agreement to pay. Contracts are made by the agreements and implications arising from acts of parties, and not from their denials and differences."

Later, in the Friend case (30 C. Cls. R., 94), where the Government had changed a channel of the James river, resulting in the destruction of an adjacent landing by lessening the depth of water in front of it, the court, among other things, said: "Whatever may be said of the liability of the defendants, they were, as they understood it, not in the exercise of the power of eminent domain in the improvement of the river. It was in pursuance of the general policy of river and harbor improvements as recognized by acts of Congress for many years."

Such was the situation in the present case. The Government, by the exercise of its general policy of improving the navigation of the river in the interest of commerce and for the protection of the harbor at Vicksburg, constructed, by authority of appropriations of money made by Congress therefor, the revetment; not to raise or lower the water or to divert the channel of the river, but merely to hold the channel where from natural causes it had been placed.

The taking of private property under the right of eminent domain, an act of sovereignty sanctioned by the Constitution, cannot be exercised by the officers of the Government so as to fix contractural relations without authority looking to the appropriation of such property as the proximate result of their lawful acts; or by the public use and occupation of private property with the knowledge thereof and acquiescence therein by the proper officers of the Government, that is to say, to entitle the claimants to maintain an action in this court for the overflow of their lands, it must be made to appear that their right is founded upon a contract, express or implied.

18 Hence we must hold that though the injury to the claimants' lands might have been diminished in course of time by further erosion and the consequent shifting of the channel had the revetment not been built, still the fact remains that the injury done was the effect of natural causes, from which no implied contract to pay therefor can arise.

For the reasons we have given the claimants' petitions, and each of them, must be dismissed, which is ordered accordingly.

V.—*Judgment of the Court.*

THOMAS C. BEDFORD
vs.
THE UNITED STATES. } 20514.

EMMA BEDFORD
vs.
THE UNITED STATES. } 20515.

At a Court of Claims held in the city of Washington on the 3d day of February 1902 judgment was ordered to be entered in the above-entitled causes, *nunc pro tunc* as of October 28, 1901 as follows:

The court on due consideration of the premises find for the defendants, and do order, adjudge and decree that the petitions of Thomas C. Bedford, and of Emma Bedford be dismissed.

BY THE COURT.

19 VI.—*Application for and Allowance of Appeal.*

THOMAS C. BEDFORD, EMMA BEDFORD
vs.
UNITED STATES. } Nos. 20514 and 20515.

From the judgment of the court in the above-named causes rendered February 3, 1902, in favor of the defendants, the claimants by their attorney therein, this 20th day of February 1902, hereby make application for, and give notice of an appeal to the Supreme Court of the United States.

THOMAS C. BEDFORD,
EMMA BEDFORD,
Claimants,
By JOHN C. CHANEY,
Their Attorney.

Filed February 20, 1902.

Ordered: That this appeal be allowed as prayed for.

BY THE COURT.

February 20, 1902.

20 Court of Claims.

THOMAS C. BEDFORD
vs.
UNITED STATES. } No. 20514.

EMMA BEDFORD
vs.
UNITED STATES. } No. 20515.

I, John Randolph, assistant clerk of the Court of Claims hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled causes, of the findings of fact and conclusion of law

filed by the court, of the opinion of the court, of the judgment of the court dismissing the petitions, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereun' set my hand and affixed the seal of said Court of Claims this 15th day of March, A. D. 1902.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18,456. Court of Claims. Term No. 277. Thomas C. Bedford and Emma Bedford, appellants, *vs.* The United States. Filed March 19, 1902.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

THOMAS C. BEDFORD AND EMMA BEDFORD, *Appellants*,
vs.
THE UNITED STATES, *Appellee*.
No. 277.

APPELLANTS' ASSIGNMENT OF ERRORS, STATEMENT OF CASE AND BRIEF.

ASSIGNMENT OF ERRORS.

Appellants assign as error of the court of claims:

1. The finding of fact that because the "revetment did not change the course of the river as it then existed," * * therefore * * "the injury done to the claimants' land was an effect of natural causes." The fact is, "*The injury caused by the government was by interrupting the further progress of natural causes*," as the court has also found.

2. The court of claims erred in its conclusion of law,

That, because the government has control of navigable streams, and has "the undoubted power and authority to improve the river by the construction of the revetment," that, like riparian rights, "damage resulting from the construction of the dike (revetment) for the public good, was" * * * "merely incidental to the exercise of a servitude to which * * property had always been subject," and in its entire opinion.

The law is, as pronounced by this court, January 26, 1903, in United States against Lynah *et al.*, No. 45, that "Although in the discharge of its duties the government may appropriate property, it can not do so without being liable to the obligation cast by the fifth amendment of paying just compensation." That "Where the government, by the construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a *taking* within the scope of the fifth amendment."

That notwithstanding the fact that the government has full control over navigation and the improvement of navigable rivers, if in exercising such control and in doing the work of such improvement the property of an individual is appropriated (as it is in the case at bar), compensation must be made. The fifth amendment applies to an appropriation of property where it is taken on account of navigation the same as any other "taking."

Statement of Case.

By the construction of the revetment at Delta Point on the Mississippi river the current of the river was *directed* and *held* against appellants' land until it washed away and appropriated 2,300 acres thereof.

Had the river been permitted to continue its natural and undoubted course after the cut-off of 1876, Delta Point would have washed and eroded away; so that by the time the alluvial deposit inside the hills on the Mississippi (state) side had been cleared out to the rocks on that side the current would have missed by a new angle of deflection appellants' land altogether and none of it would have been appropriated, and their plantation would now remain undisturbed.

In 1876, when the Mississippi river severed De Soto Point from the main land by cutting across the narrow neck of land below Vicksburg, it ran directly across to the Mississippi state side with great force and fiercely attacked the alluvial deposit lying at the base of the rock-bound hills on that side and began a rapid disintegration thereof, thence deflected to the Louisiana state side. The current, in its new course, as savagely attacked the point of land at the cut-off on its right known as Delta Point, and rapidly wore it away. With the progress it was making it was destined to soon reach the lands lower down stream through which Grant's canal was cut. Had the river gone on in its erosion of Delta Point, as it was bound to do of its own natural force, the river would have struck the Mississippi side still lower and lower as the erosion of Delta Point progressed, and its deflection to the Louisiana side where appellants' lands lay would also have been enough lower down so to have missed said lands altogether. The river should have been allowed to pursue its natural course.

Appellants were entitled to the natural and peculiar course and action of the river. The river, however, was not allowed to proceed upon its natural course. The government, to save the harbor of Vicksburg, and to keep the city of Vicksburg on the

river, arrested the river and controlled its course by building a revetment at Delta Point, on the Louisiana side, and directed and held the current of the river, by the aid of said revetment, from washing away Delta Point, and held it against the bank on the Mississippi side so as to deflect it, and did deflect it against appellants' land on the Louisiana side, pushing the said current eventually through said land, making a navigable water-way thereof. It is this *interruption of the natural course of the Mississippi river, by the government, which resulted in the appropriation of appellants' land* of which they complain.

The substantial facts of the case are as follows: In 1878 to 1880 the United States, in the execution of its rights and powers in and over said river, and in pursuance of its lawful control over the navigation of said river, and for the betterment and improvement thereof, by its duly authorized officers and agents, in pursuance of the following acts of Congress, 20 S. L. 363, 366; 21 S. L. 181 and 470; 26 S. L. 450 and 1116; made and caused to be made and put in a certain revetment of willow, stone and other material, at a point immediately up said river a distance of about six miles from the north line of said described land at a place called Delta Point, Louisiana, where a cut-off of the river had occurred in the spring of 1876.

That said revetment was constructed along said river for a distance of one-half mile; that said revetment was so constructed, at said point in and on said river, as to effectually and completely divert the waters of said river from its natural southward course toward the east; and said revetment was constructed also for the purpose of keeping the bed of said river channel from moving southwestward at the point of said construction in the state of Louisiana, and for

the further purpose of preserving the harbor for the city of Vicksburg, in the state of Mississippi.

That said revetment was constructed in the years 1878, 1879 and 1880 as aforesaid, and was rebuilt and improved and extended by defendant in the years 1892 and 1893. That the construction and maintenance of said revetment prevented the erosion of Delta Point, Louisiana, and caused the waters of said river to be diverted from a south and southeasterly course to an easterly course, and to be thrown with great force against the east bank of said river, which bank extends from the north to the south, is high and strong and is composed of limestone and other hard substances, which do not give way to erosion. That said waters were and are diverted as aforesaid, by said revetment against said east bank with great force, and was and is by said bank thrown back against the west bank of said river also with great force, at and along the bank of said west side, where said described sections of land are located, and directed against the same.

That owing to said revetment constructed by the government as aforesaid, the channel and current of the Mississippi river were directed against and upon the said lands of the petitioners, wherein and whereby 2,300 acres of the same were washed away and appropriated by the waters of the Mississippi river, and the United States has therein and thereby appropriated plaintiffs' lands to their own public use.

Brief of Argument.

We hold that there can be no difference in principle between the taking of land by the government for a navigable waterway for the use of steamboat traffic

for the public good and that of backing up water over a man's land through a public dam constructed so as to work such a result, as this court held in the said case of *United States* v. *Lynah et al.*, the present term, above referred to. The revetment as well as the dam appropriates the land and deprives the owner of its use.

It was a public statute which authorized the dam, and it was a public statute which authorized the building of the revetment. The officers of the law derived their authority, in both instances, from the same source.

Both enterprises were for the public good, and the public good, in both instances, was at the expense of private rights. The one was to afford the public wholesome drinking-water, the other water at a particular place on which to navigate.

Both were eminent domain, even though navigation was sought to be improved in one. The one had no other excuse for its appropriation of private property, the other claimed rights beyond public ownership, namely, the right to *improve* its public ownership.

Where this public right is asserted are private rights not to be respected? Appellants are told that constitutional guarantees of private property only extend to cases where eminent domain is exercised independently; that the right to improve the navigation of a river may involve the appropriation of private property, yet the individual has no recourse; that the constitution does not mean him when it says, "nor shall private property be taken for public use without just compensation."

The court of claims put appellants' lands, from which they drew their substance, upon a par with the riparian rights of their lands. As we understand the

court of claims, because riparian rights are subject to navigation rights and under servitude thereto, the fee-simple of lands lying on a navigable stream, is also subject to public water-way rights, and may be appropriated to public use without "just compensation."

We must respectfully take issue with this conclusion. We maintain that a man's land is not subject to the uncompensated appropriation of a navigable river. We also maintain that a man's land is not subject to the natural right of the improvement of navigation except on the basis of compensation.

Riparian rights are river rights; fee-simple lands are independent of the river and are in no wise related to river navigation. It may be admitted that a man's riparian rights are subject to the river, and the changes and improvements of the river, to which there may be mere consequential injury in making an improvement of navigation. Riparian rights are wholly dependent on the river. Fee-simple lands are not. But for the river or the navigable waters there would be no riparian privileges; not so with lands outside river bounds. Riparian rights are on a different footing from fee-simple ownership. By riparian rights is meant all rights in the alluvial accretions and the use thereof subject to navigable rights of the river itself. Land independent of the river limits is subject to no exception. The one is subject to the servitude of navigation; the other is not. Therefore it does not follow that because riparian rights must give way to navigable rights so must fee-simple lands. And it does not follow that because riparian rights are burdened with servitude to navigation that the lands to which riparian rights attach may be taken for a public use without just compensation. And it does not

follow that as because lands lie along a navigable stream that they, *by reason of their location*, are burdened with the servitudes of navigation, and that when same are taken in the course of public improvements of navigation they may not be paid for under authority of the fifth amendment.

The mere subordination of a riparian right to an improvement of navigation is not like a *taking* of independent lands for a public water-way. The one is the exercise of a proper servitude; the other is not. Independent lands are not subject to such a servitude. There is no such thing as servitude upon land ownership in the United States. Independent lands are of a dignity above mere riparian rights to accreted lands and lands above low-water mark.

In our view of this case, therefore, the case of Gibson, in 166 U. S., cited in the court of claims opinion, is not pertinent, and so with Gilman's case, 3 Wallace, also cited therein. It is not our contention that the government has not absolute control of navigable waters; and we do not contest the proposition that the shore and submerged soil is subject to servitude to navigation, but that appellant's property, if taken, must be paid for.

We insist that appellants' 2,300 acres of land—not being "shore and submerged soil"—was not subject to a so-called servitude to navigation. We contend that appellants' 2,300 acres of land, not being subject to servitude to navigation, was appropriated outright by the government to a public use, and that the constitution guarantees payment therefor precisely as was decided in the Great Falls case, in 112 U. S. 645.

There was a more real taking of appellants' land when the river-bed is made to occupy the place where

the 2,300 acres once were, than in the Great Falls case, where the lands are simply covered with water. Appellants' land was actually taken away to make room for the river; and the river now runs where their productive soil once was. If the Great Falls case was meritorious, why is there not merit here? And so in *Pumpelly* v. *Green Bay Co.*, 13 Wallace, 181.

In Gibson's case, in the construction of the dyke the plaintiff was deprived of the "use of her landing" through the greater portion of the gardening season, whereby the value of her farm was reduced $150 to $200 per acre. Here was only a consequential injury, not a *taking* of the property. Her landing was rendered inconvenient.

Such was the fact in Mills' Case, 46 Fed. Rep. 738. That suit was for compensation for *injuries* to a rice plantation, resulting from improvements of navigation. The declaration averred the damage to be $10,000, for which judgment was asked.

There was no averment that the plantation was appropriated to a public use.

The case at bar is different. Here the "improvement" caused the actual and physical appropriation of appellants' lands.

The language used by His Honor, Justice Brewer, in the Lynah case is exactly suitable to the facts in the case at bar. Here, "the government did not deny the title of the plaintiffs, * * nor did it pretend that it owned the property or had a paramount proprietary right to its possession. It did not put in issue the question of title. * * Nowhere in the record did it set up any title to the property antagonistic to that claimed by the plaintiffs. It simply denied responsibility for what it had caused to be done. * * * The case was tried on the theory that the government could

not be held responsible for what it had done." This case is exactly like said case and was tried on the same theory.

The right of the government to improve the harbor of Vicksburg and the navigation of the Mississippi river is conceded, as is also the right to take appellants' property in the accomplishment of these purposes; but this is a *governmental* right, not a *proprietary* right. All private property is held subject to the necessities of the government.

If, therefore, the officers and agents of the United States took appellants' lands under sanction of authority, the government is bound to make just compensation.

The building and maintaining the revetment was duly authorized by congress, as follows: (20 S. L., 363–366.)

Be it enacted, etc.,

"That the following sums of money be, and are hereby appropriated, to be paid out of any money in the treasury not otherwise appropriated, to be expended under the direction of the secretary of war, for the construction, completion, repair and preservation of the public works hereinafter named: For improving the Mississippi river at and near Vicksburg, and protection of harbor at Vicksburg, Mississippi, fifty thousand dollars."

In 21 Statutes at Large, 181:

"Improving Mississippi river at and near Vicksburg, and protection of harbor at Vicksburg, Mississippi; continuing improvement, twenty thousand dollars."

At page 470, same Statutes at Large:

"Improving Mississippi river at and near Vicksburg, and protection of harbor of Vicksburg, Mississippi, seventy-five thousand dollars."

Volume 26 Statutes at Large, page 450:

"Improving Mississippi river from the Head of the Passes to the mouth of the Ohio river * * * three million two hundred thousand dollars, which sum shall be expended under the direction of the secretary of war in accordance with plans * * * for the general improvement of the river * * * for the work at the harbors * * * of Vicksburg, Mississippi," etc.

By an act of congress passed March 3, 1891 (26 S. L., 1116), $1,000,000 was appropriated for the improvement of the Mississippi river from the Head of the Passes to the mouth of the Ohio, to be expended under the direction of the secretary of war in accordance with the plans of the Mississippi river commission.

The orders and directions of the secretary of war for the construction of said revetment were duly authorized therefore, and the taking of the claimants' land by the Mississippi river, which was diverted from its natural course against and upon said land by the said revetment, was a taking of their private property for public use as contemplated by the fifth amendment to the constitution.

The right of eminent domain underlies all property rights. The government may take real or personal property whenever its necessities require it.

As the court say in the Lynah case:

"Although there may have been no specific act of congress directing the appropriation of this property * * * yet if that which the officers of the government did, acting under its direction, resulted in an appropriation it is to be treated as the act of the government," and is a taking of the property.

As in the Lynah case, congress here "made appro-

priations from year to year for the improvement of the river, and these improvements were carried on under the direction of the officers and agents of the government. In the course of their duties, in pursuance of said appropriations, this revetment at Delta Point was built, and the appropriation of appellants' land resulted from its construction."

Does not an implied contract consequently arise to pay for such appropriation of property?

The Great Falls case is applicable here.

The court say:

"It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by congress, for the appropriation of money specifically for the construction of the dam from Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of compensation required by the constitution, * * * there is no sound reason why the claimant may not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. (*Kohl* v. *United States*, 91 U. S. 367.)

"In that view we are of opinion that the United States, having by its agents, proceeding under the authority of an act of congress, taken the property of

the claimant for public use, are under an obligation, imposed by the constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimants' cause is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims of actions founded upon any contract, express or implied, with the government of the United States."

See, also,

Sanford v. *United States*, 101 U. S. 341;
Boone Co. v. *Peterson*, 98 U. S. 403;
United States v. *Jones*, 109 U. S. 573;
Barron v. *Baltimore*, 7 Pet. 243;
Withers v. *Buckley*, 20 How. 84.

In the case of Pumpelly against the Green Bay Company, 13 Wallace, page 166, there was an appropriation of private property for a public use, much like the case at bar.

The Green Bay and Mississippi Canal Company was a public corporation in the state of Wisconsin, and under authority of an act of the legislature of the territory of Wisconsin, constructed a dam across Fox river, the northern outlet of Lake Winnebago, which caused the waters of said lake to raise so high as to forcibly and with violence overflow 640 acres of Pumpelly's land, and the said waters thereafter so far possessed the same as that Pumpelly lost the proper use thereof.

The constitution of the state of Wisconsin contains the following fundamental statement:

"The property of no person shall be taken for public use without just compensation therefor."

The supreme court held that by the general law of European nations and the common law of England, it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use.

And the constitutional provisions of the United States and of the several states which declare that "private property shall not be taken for public use without just compensation," were intended to establish this principle beyond legislative control.

It is not necessary that property should be absolutely *taken*, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution.

The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provisions demands compensation.

The court in that case say:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation

to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for inversion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In the New Jersey case of *Sinnickson* v. *Johnson*, cited in the Pumpelly case, Judge Dayton, in his opinion therein, said:

"That this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

At the time of the rendition of this decision the state of New Jersey had no constitutional provision on the subject.

The state of New York had no constitutional provision on the subject in Chancellor Kent's time, when he, in the case of *Gardner* v. *Newburgh*, granted an injunction against diverting a stream through plaintiff's land from its usual course, because the act of the legislature authorizing it made no provision for compensating him for the injury done.

In the last named case it is laid down as a clear

principle of natural equity that the individual whose property is thus sacrificed must be indemnified.

Said case was where the diversion of the water from plaintiff's land was considered a taking of private property for public use, and therefore, like overflowing the land, be called only consequential damage or injury.

In Angell on Water Courses, section 465a, it is laid down as a rule that a serious interruption to the common and necessary use of property is a *taking* of it, and that it is not necessary that the land be absolutely taken.

Grotius was an early authority on the right of eminent domain. He said:

"We have elsewhere said that the property of subjects is under the eminent dominion of the state, so that the state, or he who acts for it, may use or even alienate or destroy such property, not only in cases of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be observed that when this is done the state is bound to make good the loss to those who lose their property."

The power to take private property for public uses belongs to every independent government. It is an incident of sovereignty, and does not require constitutional recognition.

This power is recognized by the constitution of the United States wherein, by its fifth amendment, it declared that private property shall not be taken without just compensation.

The United States v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668;

High Bridge Lumber Co. v. *The United States*, 37 U. S. App. 234;
Barron, etc., v. *Mayor of Baltimore*, 7 Peters 243.

In *Hallister* v. *Benedict Manufacturing Co.* (113 U. S. 59), a patent infringement case, it is stated:

"If the right of the patentee was acknowledged, and, without his consent, an officer of the government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie within the jurisdiction of the court of claims, such as was entertained and sanctioned in the case of the United States against Great Falls Manufacturing Company (112 U. S. 645)."

It was held, in the case of *United States* v. *Palmer* (128 U. S. 262) that compensation must be made where the officers of the government use the patented device of an individual where he authorized its use by them.

See, also, *United States* v. *Berdan Firearms Co.* (156 U. S. 552).

And the court, in Lynah case, say:

"The rule deducible from these cases is that, when the government appropriates property which it does not claim to own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as *owner* and by virtue of its ownership, and if an officer of the gov-

ernment takes possession of property under the claim that it belongs to the government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own.

"Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. * * * The contention that the government had a paramount right to appropriate this property may be conceded, but the constitution in the fifth amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised *it shall be attended by compensation.*

"The government may take real estate for a post-office, a court-house, a fortification or a highway; or in time of war it may take merchant vessels and make them part of its navel force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in the individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as many others."

See, also,

South Carolina v. *Georgia*, 93 U. S. 4, 13;
Wisconsin v. *Duluth*, 96 U. S. 379.

In the case at bar there is no dispute about the ownership of the lands taken being in appellants. The United States does not pretend to own the same. The government claims the right to appropriate these lands, without compensation, because it needed them in improving the navigation of the Mississippi river and the harbor of Vicksburg. Its contention is that when navigation is to be improved lands lying along

the navigable streams become mere riparian possessions burdened with the servitude of navigation, and subject to appropriation without compensation, and this is the position taken by the court of claims.

From the findings it is clear that what was a valuable plantation has been permanently swept away "as the necessary result of the work which the government has undertaken."

The case of *Pumpelly* v. *Green Bay Co.*, says this is a "taking" of appellants' lands for public use, as stated in the opinion of the court in the Lynah case.

See, also,

Angell on Water Courses, Section 465a;
Hooker v. *New Haven & N. Co.*, 14 Conn. 146;
Rowe v. *Granite Bridge Co.*, 21 Pick. 344;
Canal App. v. *The People*, 17 Wend. 604;
Lockland v. *North M. R. R. Co.*, 31 Mo. 180;
Stevens v. *Prop'r of Middlesex Co.*, 12 Mass. 466.

Commenting on these authorities the court, in the Lynah case, says:

"It is clear from these authorities that where the government, by the construction of a dam *or other public works*, so floods lands belonging to an individual as to substantially destroy their value there is a *taking* within the scope of the fifth amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those *at least which belong to a riparian proprietor*—pass

to the government and it becomes henceforth the full owner."

How nicely the above language fits the case at bar. Here the revetment checked and permanently stopped the erosion of Delta Point, arrested the course of the Mississippi river and directed and held the current of the river against the Mississippi (state) bank so as to deflect it back to the Louisiana side against appellants' lands; and thus washed them away, and made the navigating channel of the river through the heart of appellants' said plantation, where said channel now is. 2,300 acres of appellants' lands have thus been taken and appropriated by the government to make a new channel for the Mississippi river so that the navigation of said river might be improved and the harbor of Vicksburg saved to the commerce of said river. It is a great big fact, and the individual contribution to this public enterprise is worthy of compensation.

The kernel of the case, however, is reached by the following language of the court in the Lynah case:

"Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others it is an injury which is purely consequential, and for which the government is not liable. *But*, if any one proposition can be considered as settled by the decisions of this court it is that, *although in the discharge of its duties the government may appropriate property, it can not do so without being liable to the obligation cast by the fifth amendment of* PAYING JUST COMPENSATION."

The question was also squarely presented in the case of the *Monongahela Navigation Co.* v. *United States*,

148 U. S. 312, and the court delivered its decision as follows:

"Like the *other* powers granted to congress by the constitution, the power to regulate commerce is subject to all the limitations imposed by said instrument, and among them is the fifth amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, *but* if, in exercising that supreme control, it deems it necessary to take private property, *then* it must proceed subject to the limitation imposed by the fifth amendment, and can take only on payment of just compensation."

In the case of *Scranton* v. *Wheeler*, 179 U. S. 141, 153, the same proposition was stated as follows:

"Undoubtedly compensation must be made or secured to the owner when that which is done to be regarded as a taking of private property for public use within the meaning of the fifth amendment of the constitution, and, of course, in its exercise of the power to regulate commerce, congress may not override the provision that just compensation must be made when private property is taken for public use."

In the course of the court's opinion in the case of the *Transportation Company* v. *Chicago*, 99 U. S. 635, after referring to the cases above cited and others, the court said:

"Permanent flooding of private property may be regarded as a taking. In those cases there was physical invasion of real estate of the private owner, and a practical ouster of his possession."

Here appellants' lands have been physically invaded and he has been absolutely "ousted of his possession." The facts in the case at bar parallel those cases, and render just compensation for these lands imperative under the fifth amendment.

Even if we are to restrict the ownership of appellants' lands to mere riparian rights, it is unfair to appropriate them without compensation.

By the Encyclopedias England makes compensation where it takes such rights under its eminent domain.

The theory of our government is that the rights of the individual when subordinated to the public necessities shall be compensated for. Private property is subject to public uses only when paid for. It matters not for what special purpose private property may be taken, it is subject to the limitations of payment cast by the fifth amendment.

It can make no difference whether the property is taken in the regulation of commerce, the improvement of navigation, or to furnish wholesome drinking water for Washington, it is a "taking" for public uses, and must be paid for.

It is a great hardship which requires the appellants to contribute 2,300 acres of land that the city of Vicksburg shall remain on the Mississippi river. There are no benefits resulting to the claimants from the Vicksburg harbor. Why should they be compelled to sacrifice their possessions to such a purpose without compensation?

It is respectfully believed and submitted that the Lynah case is conclusive of the one at bar, and that the court of claims should be reversed and the cause remanded to that court with directions to give appellants judgment for the value of their lands taken and appropriated by the government as aforesaid.

JOHN C. CHANEY,
Attorney for Appellants.

March 3, 1903.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THOMAS C. BEDFORD, APPELLANT,
v.
THE UNITED STATES.

EMMA BEDFORD, APPELLANT,
v.
THE UNITED STATES.

No. 277.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These are appeals by the claimants from a judgment of the Court of Claims dismissing their petitions.

It appears from the record that prior to 1876 the Mississippi River flowed around a narrow point of land, known as De Soto Point, and by the city of Vicksburg in a southwestly direction. In the spring of 1876 the point became so narrow by erosion that the river broke through, leaving De Soto Point as an island and shortening the course of

the river by about 6 miles, with the result that the current of the river was thrown with great velocity and at an abrupt angle against the Mississippi bank of the river. The appellants owned certain land on the Louisiana side of the river, a number of miles below the cut-off thus formed. The current of the river was deflected from the Mississippi bank to the Louisiana bank of the river at a point somewhat above the lands of the appellants, causing the Louisiana bank of the river to be eroded to a great extent.

Another result of the cut-off was that the city of Vicksburg was left several miles from the main channel of the river, to the great damage of its commerce. The south side of the cut-off was further eroded by the action of the river, and the channel of the river was being continually farther removed from the city of Vicksburg.

In order to prevent further damage, the United States erected on the south side of said cut-off certain revetments which are described in Finding IV, the result of which was to prevent the further erosion of that point, and to hold the current of the river in its then position at Delta Point.

The court below also finds that the point of contact of the current of the river with the Louisiana bank gradually worked downstream until it reached the lands of the appellants and washed away those lands to the extent of 2,300 acres, and that ever since that time such lands have been completely submerged.

The court also found that if the revetments had not been constructed, the point of contact of the current on the Mississippi side would have worked south more rapidly, and consequently the point of contact on the Louisiana side would have moved southward more rapidly and would sooner have left the lands of the appellants, and in that event those lands would not have been eroded to the same extent. It is found that the rapidity of the changes and the lessening of the damage in the absence of the revetment are both conjectural.

The other significant facts found by the court are those in Findings IV, V, and VII, and may be summarized as follows:

The revetments were constructed on land entirely below the high-water mark of the river, and were not upon nor in contact with the lands of the appellants.

The United States in making said improvements did not recognize any right of property in the appellants in and to the right alleged to be affected, and did not assume to take private property in and by the construction of the revetments, but proceeded in the exercise of a claimed right to improve the navigation of the river.

The cause of the deflection of the current of the river onto the appellants' land was the cut-off, and the course of the river, as it then existed, was not changed by the revetments, but they operated to keep the direction of the current of the river at that point as it then was.

If the revetments had not been built, the injury to the appellants' land would have been decreased, but the extent of such decrease is conjectural.

The injury done to the appellants' land was an effect of natural causes which the Government interrupted.

The rapidity of the changes, and the extent thereof, in case the revetments had not been built, are also matters of conjecture.

Under these circumstances are the appellants entitled to recover the value of their lands?

ARGUMENT.

THE COURT OF CLAIMS HAD NO JURISDICTION.

The United States had a governmental right to improve the navigation of the Mississippi River by the constructions in question, and also a proprietary right in the bed of the stream, below low-water mark, upon which such constructions were placed, and having done no act to recognize the appellants' title, but simply having placed improvements on land it owned, no contract can be implied to pay for other lands, and therefore the Court of Claims was without jurisdiction.

It is the settled law of this court that the Court of Claims has no jurisdiction of an action sounding in tort.

Schillinger v. *United States*, 155 U. S., 161.
United States v. *Lynah*.

It is submitted that this is a case sounding in tort. This question of jurisdiction was fully presented in the court below. Although not in terms

discussing the question as a matter of jurisdiction, that court in effect held it had no jurisdiction when it concluded, upon a review of the whole case, that—

> Still the fact remains that the injury done was the effect of natural causes, from which no implied contract to pay therefor can arise. (Record, p. 18.)

If no contract could be implied, the court had no jurisdiction to award damages.

This question of jurisdiction in river-improvement cases has recently been before this court in the Lynah case, in which it is somewhat fully considered, and were it not of so grave importance it might be considered inadvisable to go over the matter again. There are, however, so many cases now pending in which the question must be decided, that it is thought to be a matter of profitable discussion until it be fully understood by all interested. There are cases, like the Lynah case, involving destruction of rice plantations; there are cases involving the claimed overflow of extensive tracts of land in the Mississippi Valley as a result of the levee system; there are cases involving the erosion of land on the Ohio River as a result of certain improvements there made; there are cases involving damages to lands in Galveston claimed to be the result of certain improvements there made. All these cases arise out of the policy of the United States in its improvement of navigation, and the question of jurisdiction and also the question of

liability, if there be jurisdiction, is involved in each. The question is important not only as bearing on the decision of these cases, but as bearing on the future action of Congress in the improvement of navigation. The question of what the nature and extent of liability are is one that may well influence that policy. These are the excuses for fully discussing this matter, if any be needed.

In nearly every case of this class the defense has been interposed that the Court ot Claims was without jurisdiction because the case sounded in tort. If it appears that private property has been taken, the defense has been successful or not, depending upon whether or not the United States has recognized that the property taken was private property or otherwise. Whether there has been such recognition has depended on a variety of circumstances in the varying cases, but the recognition of private ownership or the lack of such recognition has been the keynote of them all.

After reviewing the authorities it was said in the Lynah case:

> The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates.

In the *Great Falls case* (112 U. S., 645) the principle was thus stated:

> In that view we are of the opinion that the United States, having by its agents, proceeding under the authority of an act of

> Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation where property to which the Government asserts no title is taken, pursuant to an act of Congress, as private property, to be applied for public uses.

The converse of this proposition is found in the *Langford case* (101 U. S., 341), in which it was said:

> It is a very different matter where the Government claims that it is dealing with its own and recognizes no title superior to its own. In such case the Government, or the officers who seize such property are guilty of a tort if it be in fact private property. No implied contract to pay can arise any more than in the case of such a transaction between individuals.

The findings in this case seem to clearly settle to which of the above classes this case belongs. Finding V is as follows:

> In making the improvement aforesaid the defendants did not recognize any right of property in the claimants in and to the right alleged to be affected, and did not assume to take private property in and by the construction of the revetment, but proceeded in the exercise of a claimed right to improve the navigation of the river. (Record, p. 11.)

By virtue of the above finding this is a case in which there was no recognition of the appellant's

or any other property rights, but, on the contrary, a claimed right on the part of the United States to do just what was done—a case in which the Court of Claims had no jurisdiction.

Beyond this it is submitted that the finding of the Court of Claims is justified by the facts that appear in this record if it were proper to question the accuracy of that finding. It does not appear that there was any communication whatever between the appellants and any officer of the United States. The land of the appellants was miles away from the revetment. There was no action of Congress except appropriations to carry on the work. It was said in the *Gibson case* (166 U. S., 272) that such appropriations by Congress are an assertion of a right to the property.

Furthermore, it might well be held if the United States undertakes to occupy property for purposes of such a character that it has no proprietary right whatever in such property actually improved nor in the property injuriously affected by the improvement, that a contract would be implied without more. Such in a measure is the Great Falls case. But there the improvement was a system of waterworks, to erect which the United States had no proprietary right whatever, but had to acquire it. The case is different where the United States without any action whatever has a beneficial interest in the property on which the improvement is placed. Under such circumstances it would

seem to be the presumption that the intention was to occupy only such property as it actually owned.

It has been settled by a long line of decisions of this court that the beneficial ownership of navigable waters in the United States and of the lands beneath such waters below the high-water mark is in the United States so far as such ownership is necessary for the regulation and improvement of navigation as incident to the regulation of interstate and foreign commerce. The Constitution of the United States vests in the United States not only the governmental right to improve navigation as a part of the governmental right to regulate such commerce, but also, so far as navigation goes, the proprietary right to the use of such property for such purpose. From such decisions the origin of such proprietary right seems evident. Navigable waters are and always have been the natural highways of commerce, travel, and communication. Unlike the other avenues and instrumentalities of commerce, they are not the work but the inheritance of man. They have been so regarded from the earliest times, and through all the evolution of the law regarding property rights. On account of their evident importance to the people in general, the ultimate governing power, the source of all property rights, has persistently refused to part with that portion of the beneficial ownership of such property which is necessary to insure its use to all the people. These property rights are not rights which have

been acquired by government, but rights which have always been retained by government whatever else may have been granted.

In *Shively* v. *Bowlby* (152 U. S., 1) Mr. Justice Gray elaborately discusses the subject. He says:

> In England from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea below ordinary high-water mark, is in the King, except so far as an individual or corporation has acquired rights in it by express grant or by prescription or usage; and that this title, *jus privatum*, whether in the King or in the subject, is held subject to the public right *jus publicum* of navigation and fishing.

The American colonies were claimed by England by the right of discovery and were subject to the same laws. Upon the Revolution these rights and titles passed to the people of the various States, and are now held by them, subject to the limitations placed upon them by the Constitution of the United States.

In *Martin* v. *Waddell* (16 Peters, 367), Chief Justice Taney said:

> When the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soil under them, for their own common use, subject only to the rights since surrendered by the Constitution to the General Government.

In *Weber* v. *State Harbor Commissioners* (18 Wall., 57), Mr. Justice Field said:

> Upon the admission of California into the Union upon equal footing with the original States, absolute dominion and sovereignty over all soil under the tide water within her limits passed to the State, with the consequent right to dispose of the titles to any part of such soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters so far as such navigation might be required by the necessities of commerce with foreign nations or among the various States, the regulation of which was vested in the General Government.

In *Illinois Central Railroad Company* v. *Illinois* (146 U. S., 387), Mr. Justice Field further said:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several States belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States.

Mr. Justice Gray also said, in *Shively* v. *Bowlby* (*supra*):

> And upon the American Revolution all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the National Government by the Constitution of the United States.

In England these rights only extended to waters in which the tide ebbs and flows. This was the early doctrine of the United States, but this court, in the case of *Genesee Chief* v. *Fitzhugh* (12 How., 443), held that that test was not applicable, and that the true test was whether or not the waters were in fact navigable.

In *Scranton* v. *Wheeler* (179 U. S., 141), the right of a raparian owner to compensation for being deprived of access to navigable water was elaborately discussed and many authorities were reviewed in the prevailing opinion to show that such compensation was not due.

In the same case the dissenting opinion reviewed a large number of cases for the purpose of showing that the right of access to navigable waters is private property pertaining to riparian lands.

It was the judgment of the court, however, that, whether property or not in such a sense that it might be "taken," nevertheless the riparian owner was not entitled to compensation.

The dissenting opinion presents an irresistible array of authority to the effect that the right of access from riparian property to adjoining navi-

gable waters is property, and it is submitted that such contention is not at all inconsistent with the prevailing opinion in that case. If correctly understood, the prevailing opinion proceeded upon the ground, not that such right was not property in such a sense that it might be "taken," but upon the ground that the proprietary interest in such property to such extent was not in the riparian owner but in the United States.

Mr. Justice Harlan said (p. 163):

> So that whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. In *Lorman* v. *Benson*, above cited, the supreme court of

> Michigan, speaking by Justice Campbell, declared the right of navigation to be one to which all others were subservient. The learned counsel for the plaintiff frankly states that compensation can not be demanded for the appropriation of the submerged lands in question and that the United States, under the power to regulate commerce, has an unquestioned right to occupy them for a lawful purpose and in a lawful manner. This must be so—certainly in every case where the use of the submerged lands is necessary or appropriate in improving navigation.

It is at this point that the dissenting opinion disagrees from the prevailing opinion. After showing that such right of access is property, it assumes that it is the private property of the riparian owner.

Mr. Justice Shiras states the following proposition (p. 185):

> Now, if it be held that Congress has power to take or destroy private property lying under or adjacent to navigable streams, without compensating their owners, because it is done in the exercise of the power to regulate commerce, then it must follow that the same unlimited power can be exercised with respect to private property not in nor bounded by water. The power of Congress to regulate commerce is not restricted to commerce carried on in lakes and rivers, but equally extends to commerce carried on by land. If Congress, yielding to a loud and increasing popular demand [*that it*] should take possession and control of the

> railroads of the country, or should undertake the construction of new railroads as arteries of commerce, this novel notion, that the existence of the right to regulate commerce creates of itself and independently of the laws of the State a Federal servitude on all property to be affected by the exercise of that right, would apply to all kinds of private property wherever situate.

The answer to these propositions seems to be that property that is not in or bounded by water was freely parted with by the Government and no ownership was retained; that the Government never did own the railroads of the country, and consequently was never in a position to retain any beneficial ownership there, an ownership which possibly might have been retained if the Government had found them ready to its hand, as it did find the navigable waters of the country.

The prevailing opinion also expressly approved the holding in *Stockton* v. *Balt. and N. Y. R. R.* (32 Fed. Rep., 9–20), and the following language therein, which, on account of such approval, is here cited as of authority. The case involved the right to erect a bridge abutment on land submerged in navigable water, and the court said:

> But it is contended that if the United States can constitutionally take the land of the State, as well as that of the citizen, for public purposes without consent, it can only do so in the same manner and subject to the same conditions, namely, that of making

> just compensation. It is urged that the language of the fifth amendment of the Constitution is applicable to the case and is imperative. This language is, "Nor shall private property be taken for public use without just compensation." It is insisted that the property of the State in lands under its navigable waters is private property and comes strictly within the constitutional provision. It is significantly asked, "Can the United States take the statehouse at Trenton and the surrounding grounds belonging to the State and appropriate them to the purposes of a railroad depot, or to any other use of the General Government, without compensation?" We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the statehouse is quite different from that by which it holds the land under the navigable waters in and around its territory.

The court then expounded the doctrine laid down in the cases above cited, to the effect that the land under navigable waters belongs to the State, but is subject to an easement in favor of the Federal Government for the purposes of navigation. The court also held that no compensation could be exacted. The only ground of this holding was that Congress was simply using its own property which it had always possessed, although it had not until that time had occasion to employ it.

In *Gilman* v. *Philadelphia* (3 Wall., 725) it was said:

> For this purpose they [navigable waters] are the public property of the nation and subject to all the requisite legislation of Congress.

The language of these cases is not consistent with the position that the only right the United States has to navigable waters and the lands under them is a governmental right to control them through the right of appropriating private property by paying therefor. Such rights would not have been discussed in such language. Such statements are not to be found in discussions of the power of the United States to use other kinds of property, as, for instance, land for post-offices, arsenals, etc. It has the governmental right to appropriate all property, but such right has never been described in the language used to describe the measure of its rights in navigable waters.

These rights of navigation and its regulation constitute part of the eminent domain of the United States. The eminent domain consists not only of the right to appropriate private property for public use upon just compensation, but it also includes many rights of a public nature which the Government already possesses without any affirmative action. This distinction is often lost sight of, but is important.

Mr. Cooley says:

> The rights of which we here speak are considered as pertaining to the State by virtue of an authority existing in every sovereignty and which is called the eminent domain. Some of these are complete without any action on the part of the State, as is the case with the rights of navigation on the seas, lakes, and public rivers, the rights of fisheries in public waters, and the right of the State to the precious metals which may be mined within its limits. Others only become complete and are rendered effectual through the State displacing, either partially or wholly, the rights of private ownership and control, and this it accomplishes either by contract with the owner, by accepting his gift, or by appropriating his property against his will through an exercise of its superior authority.

And further:

> And as there is not often occasion to speak of the eminent domain except in reference to those cases in which the Government is called upon to appropriate property against the will of the owners, the right itself is generally defined as if it were restricted to such cases, and is said to be that superior right of property pertaining to the sovereignty by which the private property acquired by citizens under its protection may be taken without regard for the wishes of its owners. More accurately, it is the right and authority which exists in every sovereignty to con-

> trol and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.
>
> Constitutional Limitations, p. 643.

In the case at bar the United States exercised its right of eminent domain in controlling and using property which it already possessed, and not in any manner in taking private property which it did not possess. It was simply claiming its own. The cases cited abundantly establish the proposition that the United States already had such ownership in the property it used for improving the navigation of the river; that it might do so without compensating anybody therefor.

It is submitted that where the United States proceeds in the exercise of a legitimate governmental right to construct improvements on property which it actually owns, such actual improvements being confined to such property, there is no implied contract to pay for other property which is injuriously affected or entirely destroyed as a result of such improvements, although the United States takes no action either recognizing or disputing the title to such other property. Such conditions can not arise in cases in which the improvement is a post-office or custom-house or a system of waterworks, as in the Great Falls case, for there the United States has no proprietary right when it starts in. It has no property

to improve, but must acquire it. In such circumstances if the United States takes possession of private property without actually disaffirming the owner's title, it may be reasonable to hold that a contract must be implied. But if the United States builds a post-office or custom-house on land it has previously purchased and confines the actual improvement to such land, it seems inadmissible to hold that it is doing anything except using property it owns, although as a matter of fact the result may be that other property is destroyed.

In *Schillinger* v. *United States* (155 U. S., 163), it appeared that the United States had accepted from one Cook certain pavement in the Capitol grounds, which pavement was covered by a patent owned by Schillinger. It was evident that the United States had the property and was using it. There had been no recognition or denial of Schillinger's right, except such as might be implied from the fact that the pavement was purchased from Cook. It was held that no contract could be implied. In the case at bar there was no denial or affirmance of the appellant's rights, except such as can be implied from the claim of the United States that the property it was using belonged to it, a fact that would negative any recognition of appellant's rights fully as much as the fact in the Schillinger case that the United States dealt with Cook and not with Schillinger. A claim of title in the United States is fully equal to a claim of

title in a person from whom the United States purchases. But in the Schillinger case the court said:

> Here the claimants never authorized the use of the patent right by the Government; never consented to but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. There was no act of Congress in terms directing, or even by implication suggesting, the use of the patent. No officer of the Government directed its use, and the contract which was executed by Cook did not name or describe it. There was no recognition by the Government or any of its officers of the fact that in the construction of the pavement there was any use of the patent, or that any appropriation was being made of claimant's property. The Government proceeded as though it were acting only in the management of its own property and the exercise of its own rights and without any trespass upon the rights of the claimants. There was no point in the whole transaction, from its commencement to its close, where the minds of the parties met or where there was anything in the semblance of an agreement. So not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction and upon which rests every pretense of a right to recover. There was no suggestion of a waiver of the tort or a pretense of any implied contract until after the decision of

> the Court of Claims that it had no jurisdiction over an action to recover for the tort.

Moreover, the legislative appropriations for the purpose of improving navigation and the consequent improvement thereof are an assertion of a right to make such improvements without compensation. It was said in the Gibson case:

> The legislative authority for these works consisted simply of an appropriation for their construction, but this was an assertion of a right belonging to the Government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude to public uses (p. 276).

It can not be held that the action of the United States in this case was anything but an assertion of a right to do what it did do without compensation. Any other holding would be inconsistent with the language above quoted.

The statute (25 Stat., 94) authorizing the Secretary of War to condemn or purchase property necessary for use in improvement of navigation has been referred to in the Lynah case as in some way indicating a recognition of the right to compensation in this class of cases. It is submitted that that statute is of no force as either recognizing or denying the right of the appellants. There are many cases in which it may be necessary to condemn property for the improvement of navigation, as, for instance, property for levees or locks above high-water mark. The statute in question

but gives such right to the Secretary of War. It does not follow that it is exercised in every case in which it might be. Before the statute was enacted the authority existed in Congress. Why does its transfer to the Secretary of War affect the matter?

THE UNITED STATES IS NOT RESPONSIBLE FOR THE CAUSES OF THE DESTRUCTION OF APPELLANTS' PROPERTY.

The only element of a "taking" such as was found by this court in the Pumpelly and Lynah cases, relied upon as authority by the appellants in the discussion of this case, that appears in the findings of the Court of Claims, is the fact that the land of appellants was destroyed by the causes specified in such findings; but there are other elements which go to make up a taking of private property which were present in those cases and are not present in these. In those cases the improvements made by the United States directly caused the appropriation of the land. The United States set in motion the forces that destroyed the property in those cases. They were both cases in which the damage was caused by the erection of dams, resulting in a flooding of the property which would never have occurred had the dams not been erected. The cases at bar are very different. The force that caused the damage was not set in motion by the United States. It was an operation of natural law that set such force in motion. The court below found as a fact:

> The injury done to the claimants' land was an effect of natural causes; the injury

> caused by the Government was by interrupting the further progress of natural causes, i. e., the further change in the course of the river. (Record, p. 12.)

If these forces had not been interrupted a lesser portion of appellants' land would have been destroyed; how much less no one can tell. It seems to be a question not so much of appellants' property rights in the land which was destroyed as of their property rights in the continuance of the forces of nature. Did the appellants have such a proprietary interest in the continuation of such forces as to give them a right to damages if those forces are interrupted? This is a difficult question to answer in the affirmative. The court below laid considerable stress on this phase of the situation, saying:

> The claimants were deprived of their lands by natural causes, and if any injury was added thereto by the acts of Government it was consequential and the extent thereof is conjectural. (Record, p. 17.)

And further that court said:

> Hence we must hold that though the injury to the claimants' lands might have been diminished in course of time by further erosion and the consequent shifting of the channel had the revetment not been built, still the fact remains that the injury done was the effect of natural causes, from which no implied contract to pay therefor can arise. (Record, p. 18.)

The United States did not undertake to appropriate any property, but simply to preserve the property intrusted to its care; that is, the commercial interests of the city of Vicksburg. Those interests were suffering more and more, and such damage would have continued. Is it possible that the Government must refrain from protecting the interests intrusted to it, simply because if it did not protect them some other property would suffer to a less degree? Must the United States suffer a navigable stream to recede farther and farther from an important port because by preventing it some one's property is inundated?

The riparian owner at Delta Point unquestionably would have had the right to erect the improvement which the United States erected for the purpose of protecting his land from the inroads of the river; and this on the principle that a riparian owner may preserve the existing conditions at his property, although he may not erect constructions which will change those conditions. Subject to this limitation, he may preserve his property irrespective of the consequences to his neighbors.

It would seem that the same principle will apply to the United States in its protection of the property interests intrusted to its care.

In Angell on Water Courses (7th ed., sec. 333) it is said:

> A riparian proprietor may in fact legally erect any work in order to prevent his lands being overflowed by any change of the

natural state of the river, and to prevent the old course of the river from being altered.

The case of *Barnes* v. *Marshall* (68 Cal., 569) is in point. It there appeared that a water course had been gradually encroaching upon the defendant's land and had eroded it and caused it to cave into the river. If allowed to continue the erosion would have increased and the river would have formed a new course through the land. To prevent such action the defendant erected a bulkhead of the former height of the bank. Had the bulkhead not been erected it appeared that the changes in the river would have been such that the plaintiff's land would have been relieved of danger. The court held that the defendant was well within his rights, as he did not change the existing state of affairs. It was said:

> It therefore appears that the contention of plaintiff is that the defendant can not reconstruct his bank, washed off by the river, to such a height as the bank formerly stood, and thereby prevent the river from running through his land, which last, if permitted, would, by shortening the stream, take the water off the plaintiff's bank and render his land less liable to overflow. And he claims that the river must be permitted, without obstruction, to change its current, even if thereby it cut a new channel through and over the defendant's land.
>
> This position is not tenable.
>
> The defendant had a right to protect his land from a threatened change of the river's

channel by building a bulkhead as high as was his original bank before it washed off. He thereby took no right from the plaintiff; he simply attempted to maintain his own. (Angell on Water Courses, sec. 333.)

"A riparian proprietor may, in fact, legally erect any work to prevent his lands from being overflowed by any change in the natural state of the river, and to prevent the old course of the river from being altered." (*Farquharson* v. *Farquharson*, 3 Bligh Pr. N. S., 421, 422.)

According to the findings, the pond left from the high water on defendant's land was not a channel of the river, but only threatened to become so, which defendant was seeking to prevent. And this he had a right to do, if he did not thereby interfere with the ancient channel of the river. (Angell on Watercourses, sec. 108.)

In *Gulf Railroad Co.* v. *Clark* (101 Fed. Rep., 678), the railroad company had built an embankment for its road on land some distance from the bank of the Canadian River in the Indian Territory. The river gradually encroached up to the embankment and finally washed part of the embankment away. Thereupon the company constructed dikes some distance into the then position of the river, but on land over which the river had encroached. The dikes not only protected the company from further encroachment, but restored part of the land already lost. Clark claimed the dikes resulted in the destruction of 90

acres of his land. The court held he could not recover, and Judge Sanborn, speaking for the circuit court of appeals for the eighth circuit, said:

> When the dikes were constructed the channel of the river had been gradually changing toward the west, until it encroached upon the west bank a long distance, and the construction of the dikes necessarily changed the channel from its later location back to the position in which it was originally found. That was the purpose of their construction. While it is well settled that a riparian owner has no right to obstruct the natural channel of a river so as to divert the current of the river from its natural course, the true rule is that, when the river encroaches upon his land, he may take the necessary steps and use the necessary means to restore it to its original channel, to maintain his bank in its original condition, and to that extent at least to protect his property from the incursions of the water. The charge of the court impinged upon this rule of law, because it instructed the jury that the railway company could not under any circumstances protect itself or its own bank to the prejudice of the opposite proprietor. The restoration of a river to its original channel and the maintenance of one of its banks in its original channel and natural condition may often be to the prejudice of the riparian owners upon the other side of the stream, both in times of high and low water. But a riparian owner upon the westerly bank of

a stream is not required to sit in silence until his property is swept away by an encroaching river, because his preservation of it may increase the depth of the water in the channel, and cause an injury to the owner of the opposite bank, which he would not have suffered if the water had been permitted to carry away the westerly bank. He had the right to protect his property against such encroachments, and when they have occurred and the current of the stream has turned over his land he has the right to restore it to its original channel. Any injury sustained by the owner of the opposite bank through such action is *damnum absque injuria*, and can only be avoided by his exercise of the same right to protect his own bank. A riparian owner may construct the necessary embankments, dikes, or other structures to maintan his bank of the stream in its original condition, or to restore it to that condition, and to bring the stream back to its natural course; and, if he does no more, riparian owners upon the opposite or upon the same side of the stream can recover no damages for the injury his action causes them. *Farquharson* v. *Farquharson*, 3 Bligh Pr. N. S., 421, 422; *Rex* v. *Sewer Com'rs*, 8 Barn & C., 355; *Lamb* v. *District* (Cal.), 14 Pac., 625; *Hoard* v. *City of Des Moines* (Iowa), 17 N. W., 527; Ang. Watercouses, 333; *Barnes* v. *Marshall* (Cal.), 10 Pac., 115; *Taylor* v. *Fickas*, 64 Ind., 167; *Turnpike Co.* v. *Green*, 99 Ind., 205; *York Co.* v. *Ralls*, Can. Law T., Feb., 1900.

There are many cases involving the question of changes in the channels of rivers, and they are not all in accord, but none of them, so far as discovered, disputes the proposition here laid down to the effect that a riparian proprietor has the right to preserve existing conditions irrespective of consequences.

If, then, the United States had this right, it certainly can not be held that by exercising it there was a taking of the private property of the appellants for which compensation must be made.

THE DAMAGE IS TOO REMOTE TO CONSTITUTE A TAKING.

This court has declared in *Transportation Company* v. *Chicago* (99 U. S., 642), and reiterated the declaration in *Gibson* v. *The United States* (166 U. S., 273), that the Pumpelly case marks the extremest qualification of the doctrine that there is no liability for damages resulting to private property from the proper exercise of governmental powers when such property is not directly encroached upon. The facts in the Pumpelly case, then, may be taken to mark the boundary between direct and indirect injury to private property from public improvement of navigable waters. But those facts show that as a *direct* result of the construction of a reservoir for the improvement of navigation on the stream along which lay the land of the claimant, that land was permanently flooded and rendered entirely useless to the claimant. That is to say, in the words of Justice Strong in the

Transportation Company v. *Chicago*, "there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession." These facts were held by the court to constitute a "taking," although there was no appropriation of the land for public use in the ordinary sense. There was, however, an appropriation to this extent—that the reservoir of water created by the public improvement of the stream rested upon land of the claimant. As it was obviously necessary to the creation of the reservoir that it should have land to rest upon, it is reasonable to say that this was an appropriation of the land for that purpose. Such an appropriation does not seem to differ essentially in character from the taking of a piece of land as a site for a public building—to rest the structure upon. So, then, we have in the extremest case of "taking" private property for public use in the public improvement of navigable waters, a direct taking and appropriation of the land of a private owner by and through such improvement. It would seem to follow, therefore, that there can be no recovery in any case in which there is not shown to be an equally direct taking and appropriation. That is to say, it must appear that, as a direct and necessary part of the scheme or plan of the public improvement of navigable waters, the land of the private owner is in some manner taken and appropriated in the course of such work for the purpose of carrying on or completing the same. Failing this, there can be no

recovery, even though as an indirect result of such public improvement the real estate of a private owner is injured even to the extent of practically destroying the same.

There are several cases decided by this court more or less analogous to the cases at bar in which no recovery was had because the damages were consequential, and therefore *damnum absque injuria*. Those cases seem to be decided upon the character of the damage inflicted.

In *Gibson* v. *United States* (166 U. S., 269) and *Scranton* v. *Wheeler* (179 U. S., 141) it was held that the deprivation of access to and from navigable waters was consequential damage.

In *Transportation Company* v. *Chicago* (99 U. S., 635) it was held that a temporary interruption of access to property by municipal improvements was consequential damage.

In the cases at bar the nature of the damage is such as to distinguish them from the cases cited, but there is the other consideration that here the damage is not the direct and proximate result of the action of the United States. The damage is too remote. As already pointed out, the United States was not the direct cause of this injury. A natural force was interrupted which in its turn readjusted itself to the new conditions, and in so doing caused a conjectural amount of injury to the appellants. The damage did not directly flow from the acts of the United States, and, therefore,

those acts are not the direct and proximate causes of the damage.

THE DAMAGES ARE NOT PROVEN AND CAN NOT BE.

The findings do not disclose the amount of land that would have been destroyed in the absence of the improvements in question, nor the amount that would have been saved to the appellants, but specifically show that it can not be determined. The extent of damages is not capable of proof; it is conjectural. There is consequently a failure of proof and of findings sufficient to entitle the appellants to any judgment, and further than this it is evident that such findings can not be supplied. It is the burden of the appellants to prove their cases and if they can not do so it is their misfortune.

Damages that are speculative and conjectural in their nature can not be recovered. In the case of *Howard* v. *Stillwell Co.* (139 U. S., 199), this court in discussing the question of expected profits as an element of damages for breach of contract, in stating several reasons why they could not be recovered, said:

> In the greater number of cases such expected profits are too dependent upon numerous uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages.

In *Central Trust Co.* v. *Clark* (92 Fed. Rep., 293), Judge Sanborn, speaking for the circuit court of

appeals for the eighth circuit, in summarizing the principles relating to damages, said:

> Damages which are the natural and probable result of a breach of contract, and which may be reasonably anticipated therefrom, but which are so speculative and so dependent upon numerous and changing contingencies that their amount is not susceptible of proof with any reasonable degree of certainty, may not be recovered. (*Howard* v. *Mfg. Co.*, 139 U. S., 205–210, and cases cited; *Cahn* v. *Tel. Co.*, 40 Fed., 40).

It is submitted that the causes and extent of the injury done the appellants are too speculative and indefinite to form the basis of an implied contract to pay as for a taking of private property.

The judgment of the Court of Claims should be affirmed.

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O

Supreme Court of the United States.

No. 23.—October Term, 1903.

Thomas C. Bedford and Emma Bedford, Appellants, *vs* The United States. } Appeal from the Court of Claims.

[January 18, 1904.]

The appellants were owners of land on the Mississippi River, in the State of Louisiana, amounting to five thousand or six thousand acres, upon which were cabins, other buildings and fences. They brought suit in the Court of Claims for damages to their lands, alleged to have resulted from certain works of the United States. The damages consisted, as found by the court, of the erosion and overflow of about twenty-three hundred acres of the land. The works of the government and their operation are described by the court in the following findings:

"Prior to the spring of 1876 the Mississippi River flowed around a narrow neck of land known as De Soto Point, and in going around this point flowed by the city of Vicksburg in a southwesterly direction. In the spring of 1876 De Soto Point became so narrow by erosion that the river broke through, leaving De Soto Point as an island, thereby shortening the distance of the stream about six miles, and taking its course immediately to the south with great velocity against the Mississippi bank at what is known as the cut-off of 1876. The result was that the city of Vicksburg was left some miles away from the main channel of the river, and the old channel in front of the city was continually filled up, making the approach from the river to the docks along the river difficult, if not impossible.

"Between 1878 and 1884 the United States constructed about 10,700 feet of revetment along the banks of the Mississippi River at Delta Point, Louisiana, for the purpose of preventing the further erosion of that point. The revetment consisted of willow mattresses weighted down by stones, and were placed on sand banks below high-water mark. The revetment was neither upon nor in contact with the claimants' lands. The object of the construction was to prevent the navigable channel of the river from receding farther from the city of Vicksburg, which had been left some distance from the main channel of the river by the cut-off of 1876, as aforesaid. The revetment was repaired slightly in 1886 and 1889, and more extensively in 1894, all of which work was paid for from time to time out of the appropriations made therefor by Congress, as found in 20 Stat. 363, 366; 21 Stat. 181, 470; 26 Stat. 450, 1116.

"In making the improvement aforesaid the defendants did not recognize any right of property in the claimants in and to the right alleged to be affected, and did not assume to take private property in and by the con-

struction of the revetment, but proceeded in the exercise of a claimed right to improve the navigation of the river.

"After the cut-off at De Soto Point in 1876 and the construction of the revetment, as aforesaid, the channel and current of the Mississippi River were gradually directed toward the lands of the claimants, situated about six miles below said cut-off, and did, about the year 1882, reach said lands and thereafter erode and overflow about 2,300 acres of their lands, which overflow has ever since continued. About 400 acres of their lands so eroded and overflowed was prior to the death of said George M. Bedford, through whom the claimants claim title, and about 900 acres of which were overflowed thereafter and prior to said judicial sale, and the residue after said sale. Of the lands so overflowed about 1,300 acres thereof were cleared and in cultivation, of which about 700 acres were so cleared prior to May 2, 1895.

"The damage to the claimants, and each of them, by reason of the washing away of their lands during their respective ownership, as aforesaid, is an excess of $3,000.

"The cause of the deflection of the river upon the claimants' land was the cut-off, which shortened the distance of the stream six miles, and thereby increased the velocity of the current, and forced the current to turn, when it struck the Mississippi bank, at an abrupt angle. The revetment did not change the course of the river as it then existed, but operated to keep the course of the river at that point as it then was. If the reverment had not been built the cut-off would have continued to widen toward the Louisiana bank, and the channel would have continued to move in the same direction. With the widening of the cut-off and the shifting of the channel the angle of the turn below the cut-off would have gradually become less abrupt, and the deflection of the stream upon the claimants' land would have grown less, and the consequent injury to the claimants' land would have been decreased. To what extent the injury would have been decreased is conjectural. The injury done to the claimants' lands was an effect of natural causes; the injury caused by the government was by interrupting the further progress of natural causes, *i. e.*, the further change in the course of the river, and is also conjectural."

The court deduced from the facts that the claimants were not entitled to recover, and dismissed their petitions. (36 Ct. Claims, 474.)

Mr. Justice McKenna delivered the opinion of the Court.

There is no dispute about the power of the government to construct the works which, it is claimed, caused the damage to appellants' land. It was alleged by appellants that they were constructed by the "United States in the execution of its rights and powers, in and over said river and in pursuance of its lawful control over the navigation of said river and for the betterment and improvement thereof." And also that the works were not constructed upon appellants' land, and their immediate object was to prevent further erosion at De Soto Point. In other words, the object of the works was to preserve the conditions made by natural causes. By constructing works to secure that object appellants contend there was given to them a right to compensation. The contention asserts a right in a

riparian proprietor to the unrestrained operation of natural causes, and that works of the government which resist or disturb those causes, if injury result to riparian owners, have the effect of taking private property for public uses within the meaning of the Fifth Amendment of the Constitution of the United States. The consequences of the contention immediately challenges its soundness. What is its limit? Is only the government so restrained? Why not as well riparian proprietors, and they also forbidden to resist natural causes, whatever devastation by floods or erosion threaten their property? Why, for instance, would not, under the principle asserted, the appellants have had a cause of action against the owner of the land at the cut-off if he had constructed the revetment? And if the government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. Asserting the rights of riparian property it might make that property valueless. Conceding the power of the government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility.

There is another principle by which the rights of riparian property and the power of the government over navigable rivers are better accommodated. It is illustrated in many cases.

The Constitution provides that private property shall not be taken without just compensation, but a distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provision. An excellent illustration is found in *Gibson* v. *United States*, (166 U. S. 269.) The distinction is there instructively explained, and other cases need not be cited. It is, however, necessary to refer to *United States* v. *Lynah* (188 U. S. 445,) as it is especially relied upon by appellants. The facts are stated in the following excerpt from the opinion:

"It appears from the fifth finding, as amended, that a large portion of the land flooded was in its natural condition between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other; that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. From this it is contended that the only result of the raising of the level of the river by the government works was to take away the possibility of drainage. But findings IX and X show that, both by seepage and percolation through the embankment and an actual flowing upon the plantation above the construction, the water has been raised in the plantation about 18 inches; that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken."

The question was asked: "Does this amount to a taking?" To which it was replied: "The case of *Pumpelly* v. *Green Bay Co.*, (13 Wall. 166,) answers this question in the affirmative." And further: "The Green Bay Company, as authorized by statute, constructed a dam across Fox River, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land." In both cases, therefore, it was said that there was an actual invasion and appropriation of land as distinguished from consequential damage. In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the Lynah case in the cause and manner of the injury. In the Lynah case the works were constructed in the bed of the river, obstructed the natural flow of its water, and was held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions. Therefore, the damage to appellant's land, if it can be assigned to the works at all, was but an incidental consequence of them.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.